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In the Supreme Court of the United States

JOHN F. DAVIS, CLERK

OCTOBER TERM, 1968.

No. ---233

LANE DRUG CO.,
A Division of A. C. Israel Commodity Corporation,
LANE'S OF SYLVANIA, INC.,
LANE'S OF BOWLING GREEN, INC.,
and
LANE'S OF OREGON, INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
and
RETAIL STORE EMPLOYEE'S UNION LOCAL 954,
RETAIL CLERKS INTERNATIONAL ASSOCIATION
AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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NATIONAL LABOR RELATIONS BOARD,
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RETAIL STORE EMPLOYEE'S UNION LOCAL 954,
RETAIL CLERKS INTERNATIONAL ASSOCIATION
AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioners petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit holding that the petitioners violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, the writ to issue only in the event that this Court should grant a petition for a writ of certiorari to either or both of the respondents.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 18-32) is reported in 391 F.2d 812. The Board's decision and order (Appendix C, *infra*, pp. 33-37; J.A.[1] 605-09), including the trial examiner's decision (J.A. 529-605), are reported at 160 N.L.R.B. 1147.

JURISDICTION.

The opinion of the Court of Appeals was entered on March 29, 1968. A decree (Appendix B, *infra*, p. 32) was entered on the same date. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1) (1964).

QUESTIONS PRESENTED.

1. Whether the National Labor Relations Board may, consistent with Fifth Amendment due process and the Federal Administrative Procedure Act, deprive a respondent of an impartial investigation and unbiased determination whether a complaint should issue in an unfair labor practice proceeding, by committing the investigation of the charge into the hands of the very individual who would act as complaint counsel at a trial on the merits.

2. Whether the court below committed error in upholding a decision of the Board that the petitioners violated section 8(a)(1) and (3) of the National Labor Relations Act, when the evidence indicates that the dual role of the investigator-prosecutor caused said representative, while acting as investigator, to use that position to bolster the case which he would present when he changed his function from investigator to complaint counsel.

3. Whether the court below properly held that the employer violated section 8(a)(1) of the National Labor

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[1] "J.A." refers to the Joint Appendix in the Court of Appeals.

Relations Act, when the sole basis for such finding was a factual conclusion without basis in the record and without foundation in findings of the Board or the trial examiner, namely, that the employees were "promised benefits if they would deal with the employer directly." 391 F. 2d 812, 818.

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment V of the Amendments to the Constitution of the United States provides in pertinent part:

> "[N]or shall any person * * * be deprived of life, liberty, or property without due process of law. * * *"

STATUTES INVOLVED.

The statutes involved are various sections of the National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. sec. 151-67, 171-82, 185-87 (1964), and section 5(c) of the Administrative Procedure Act, 60 Stat. 239 (1946), reenacted, 5 U.S.C.A. 554(d) (1967). Relevant portions of these laws are set forth in Appendix D, *infra*, pp. 37-39.

STATEMENT OF THE CASE.

The petitioners (sometimes referred to hereinafter as the "employer") are a group of affiliated and closely held corporations constituting a single employer (G.C.[2] Ex. 4; J.A. 498) and operating seventeen retail drug stores localized in the Toledo, Ohio, area. The unfair labor practice charges filed with the Board on May 3, 1965 (G.C. Ex.1-A; J.A. 2-3) and amended on June 11, 1965 (G.C. Ex. 1-C;

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[2] "G.C." refers to exhibits offered by General Counsel of the Board.

J.A. 3-5) followed efforts by Local 954, Retail Clerks International Association AFL-CIO (hereinafter referred to as the "union") to organize the pharmacists in petitioners' drug stores.

On June 17, 1965, the Eighth Regional Office (Cleveland, Ohio) of the Board issued a complaint and notice of hearing (G.C. Ex. 1-E; J.A. 3-12) taking up each of the unfair practice charges asserted by the union. These charges included alleged violations of section 8(a)(1), (3) and (5) of the National Labor Relations Act,[3] 49 Stat. 452 (1935), as amended, 29 U.S.C. sec. 158(a) (1), (3), (5) (1964).

Prior to the inception of the hearing before the Board's trial examiner, the petitioners raised by motion the due process and statutory question whether the prosecution could proceed when the determination to file a complaint was made by an investigator who used his position to obtain only certain limited information with the knowledge that he would be complaint counsel and that he would recommend prosecution (Resp.[4] Ex. A; J.A. 37-42). At the hearing, this motion was renewed orally, including the presentation of evidence in support thereof (J.A. 43-50).

On April 26, 1966, the Board's trial examiner filed an opinion (160 N.L.R.B. 1147, 1150-84; J.A. 529-605) which sustained the charges of the union in their entirety. On September 15, 1966, the Board, although it did not agree with certain of the key fact findings of the trial examiner, affirmed his decision (Appendix C, *infra* pp. 33-37; 160 N.L.R.B. 1147; J.A. 605-09). Although the issue raised by the motion was vigorously presented to the Board as a ground for reversing the examiner's de-

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[3] Sometimes referred to hereinafter simply as the "Act."

[4] "Resp." refers to the exhibits offered by the petitioners herein, who were respondents in the hearing before the Board.

cision, the Board did not discuss the constitutional and statutory questions raised therein.

Once again, on petition by the employer to review, filed with the United States Court of Appeals for the Sixth Circuit pursuant to section 10(e) of the Act, 49 Stat. 453 (1935), as amended, 29 U.S.C. sec. 160(e) (1964), the employer advanced the issue of procedural due process and proper administrative procedure as one of the grounds for reversing the decision of the Board. Brief for Petitioners, pp. 71-73; Reply Brief for Petitioners, pp. 17-18. On March 29, 1968, that court rendered a unanimous opinion (Appendix A, *infra*, pp. 18-32; 391 F.2d 812) in which it overruled the Board and found that the General Counsel had *not* sustained his burden of proving bad faith in the refusal to honor the union's claims of majority representation. 391 F.2d 812, 818-20. The court below also ruled that there was no coercion in the interviews conducted by the employer to determine the validity of these claims. 391 F.2d at 817-18.

The court below did, however, uphold the ruling of the Board that the petitioners had violated section 8(a)(1) of the Act in that "the pharmacists were * * * promised benefits if they would deal with the employer directly." 391 F.2d at 818. The only evidentiary basis for this holding was that Mr. Nupp, the discharged pharmacist, was offered "an increase in salary." *Ibid.* These facts, however, appear nowhere in the record, the findings of the trial examiner, or the decision of the Board.

Moreover, in making its ruling of section 8(a)(1) violation, and in holding that pharmacist Nupp was discharged solely because of his union membership, the court below did not in any way consider the constitutional and procedural improprieties and errors referred to above. It is these two basic errors in the rulings adverse to these petitioners which serve as the basis for this petition.

REASONS FOR GRANTING THE WRIT.

A. The "dual capacity" of complaint counsel violated the due process clause of the Fifth Amendment.

The court below ruled that the petitioners have violated section 8(a)(1) and (3) of the Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. sec. 158 (a)(1), (3) (1964), without considering a unique and extremely important question of constitutional law and federal administrative procedure. When complaint counsel for the Board undertook to act as an impartial investigator, in reality, he was building his case for the prosecution. This dual role violated the constitutional rights of the petitioners to due process of law. U.S. Const. amend. V.

It is not simply a matter of demonstrating that these specific petitioners in this specific proceeding were prejudiced by the partial role of the dual-capacity investigator, although it will subsequently be developed that there is ample evidence to support this proposition. Petitioners submit that administrative agencies may not, consistently with the due process clause, commit the investigation of the charge into the hands of the very individual who will act as complaint counsel at a trial on the merits. Under such circumstances, a dispassionate and impartial evaluation would seem to be beyond the expectations of human nature.

Recently, Fifth Amendment Due Process has become synonymous with the concept of fundamental fairness. The latest decisions, moreover, reveal a trend to require not only proof of substantial fairness, but the avoidance of even the appearance or probability that unfair processes will pervade the proceeding. The trend began with this Court's decision in the case of *In re Murchison*, 349 U.S. 133, 136 (1955), where it was held:

"Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

When the investigation has been unfairly or improperly conducted, it is extremely difficult to prove as a matter of evidence that prejudice resulted. The procedure attacked here, however, "involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. Texas,* 381 U.S. 532, 542-43 (1965). Such circumstances leave no choice but to require the appearance of impropriety to prevail and to invalidate the entire prosecution which follows it. See *Parker v. Gladden,* 385 U.S. 363, 365 (1966) (per curiam).

Recently, the police commissioner of the City of New York ruled that a police investigator in a prostitution case (which is considered neither a misdemeanor nor a felony under New York law and which, therefore, raises an appropriate parallel) may not act as the prosecutor in subsequent court proceedings. Overruling a practice of thirty years' standing, the Commissioner stated: "Where the arresting officer and the prosecutor are in a sense but one, the theory of checks and balances fails in a very significant area." [5] "Rules and regulations made by government agencies in order to be valid must have a rational basis." *Coakley v. Postmaster of Boston,* 374 F.2d 209, 210 (1st Cir. 1967).

Further, in the administration of military justice, there has been recognition of procedural impropriety, from a constitutional as well as a statutory standpoint, of combining in one person the simultaneous roles of investigator and trial attorney for the agency. Thus, in

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[5] New York Times, May 21, 1967 (Sunday), p. 2E.

Smith v. Hiatt, 170 F.2d 61 (3d Cir. 1948), *rev'd sub nom. Humphrey v. Smith*, 336 U.S. 695 (1949),[6] although the statute only required, as the Board also requires, that the investigation be conducted impartially, it was held that a cooperating investigator could not also act as assistant judge advocate. It is important to note that, in the *Smith* case, the facts were much less favorable to the party prosecuted than are the facts herein, since the "investigator" in *Smith* conducted very little, if any, of the pretrial interrogation and apparently did not actively participate in the trial.

To the same effect is *Hicks v. Hiatt*, 64 F. Supp. 238, 249 (M.D. Pa. 1946), where the court recognized that the accused in a military hearing must rely upon an impartial investigative technique because he does not have complete access to the witnesses. Much the same observation would apply to the respondent in an unfair practice proceeding.

And in *Henry v. Hodges*, 76 F. Supp. 968, 973-74 (S.D.N.Y. 1948), *rev'd on other grounds*, 171 F.2d 401 (2d Cir. 1948), *cert. denied*, 336 U.S. 968 (1949), the court held that, as a matter of law, an accused in any proceeding is entitled to an impartial investigator. Speaking of an investigator who knows that he will act for the prosecution, the court asked:

> "Can we reasonably hope that such investigator will pursue interrogation and examination of proposed witnesses with the same zealous and unbiased effort as one who has had no previous contact with the case? The answer to those questions is obvious. It is manifestly impossible for him to conduct the thor-

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[6] Although this Court reversed the court of appeals by a 6 to 3 vote, the basis for the reversal was a jurisdictional issue, and apparently the question of proper procedure as a constitutional proposition was not directly raised. 336 U.S. at 697.

ough and impartial investigation contemplated and directed by Act of Congress."

But, if there was ever any doubt as to Congress' intent that the impartial investigator must be excused from participating in the hearing on behalf of the agency, that doubt was finally resolved by the passage of article 27(a) of the Uniform Code of Military Justice, 10 U.S.C. sec. 827(a) (1964), which provides that "no person who has acted as investigating officer * * * may act later as trial counsel [or] assistant trial counsel * * *."

There is still a further practical ground for the unconstitutionality of allowing the administrative investigator to assume less than an unbiased position. The theory of this Court's holding in *Jencks v. United States*, 353 U.S. 657 (1957) is that the person accused by a federal authority of violating federal law should have the opportunity to read the statement which embodies the entire story of an accusing witness, since "the omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment are * * * relevant to the cross-examining process of testing the credibility of a witness' trial testimony." *Id.* at 667. Without such adequate cross-examination, said the Court, justice will not be done, for it is the goal of the government " 'not that it shall win a case, but that justice shall be done. * * *.' " *Id.* at 668, quoting *Berger v. United States*, 295 U.S. 78, 88 (1935).

This rule, and the reason for it, is no longer restricted to criminal prosecution. The Board, recognizing its validity in labor cases, has adopted it (*N.L.R.B. v. Arkansas-Louisiana Gas Co.*, 333 F.2d 790, 798 (8th Cir. 1964)), in section 102.118 of its regulations, 29 C.F.R. sec. 102.118 (1968).

If, however, the investigator is not impartial, he will inevitably take down less than the full story; or, if he is certain that the witnesses will insist upon inserting facts adverse to the prosecution, he will not write up statements at all. In other words, a partial investigator cannot help but limit the rights of the accused respondent under the *Jencks* decision and under the policy which more recently has applied that decision to non-criminal, administrative cases.

B. There is evidence that, in this case, the dual capacity of complaint counsel operated to the prejudice of the petitioners.

The record before the Board and the court below adequately indicates that, as petitioners contend, when complaint counsel also attempts to assume the role of investigator and to determine whether a complaint should issue, this perversion of administrative process necessarily operates to defeat justice.

Some reference to the background of this litigation is necessary to reveal how such dual capacity will inevitably lead to the issuance (or non-issuance as the case may be) of complaints regardless of the evidence.

On the night of April 28-29, 1965, an organizational meeting was held (160 N.L.R.B. 1147, 1157; J.A. 545). On the day the meeting ended, the union organizer made a claim of authorization cards from a majority of the pharmacists of the employer and demanded to bargain as a representative of those pharmacists (G.C. Ex. 5; J.A. 499). The employer, mindful of a past similar claim of majority status by the same union in which a Board-supervised election yielded a 154 to 28 vote against the union (Resp. Ex. G-3; J.A. 335-36, 528), conducted a survey of its pharmacists over the ensuing Friday and Saturday which

the court below found to be non-coercive (391 F.2d at 817-18). This investigation revealed no evidence of majority representation, and in fact indicated the contrary (J.A. 431-35).

However, on the very next business day, Monday, May 3, the union filed an unfair labor practice charge based in part on the refusal of the employer to bargain with the union (G.C. Ex. 1-A; J.A. 2-3). Ultimately, the Board found that this charge was based on an invalid demand to bargain, since the union did not possess a majority of the authorization cards immediately after the meeting of April 29 (160 N.L.R.B. 1147, 1150; J.A. 608).

An impartial investigation would have revealed the impropriety, ultimately vindicated by the court below, of the section 8(a)(5) charge. An impartial investigation would have revealed, as it developed at the hearing, that some of the authorization cards were "back-dated" and therefore were of questionable value in establishing a very close claim of majority representation (J.A. 84-85, 109, 252-53). An impartial investigation would have shown that the union organizer—with knowledge of the lack of majority status—did not want an election and actually sought to avoid one (J.A. 96-97). Development of these facts prior to issuance of the complaint would have put an entirely new light on the decision to prosecute. Certainly, the lack of a valid claim of majority on May 3 should have been apparent from the face of the authorization cards themselves.

Yet, with all of these defects in view, the Board issued a complaint and notice of hearing on June 17, 1965, taking up every one of the unfair practice charges asserted by the union (G.C. Ex. 1-C; J.A. 3-12).

There are many other facts in the record indicating that the investigator-turned-prosecutor could not handle

the former role with impartiality. There is ample evidence in the record of the predetermination to issue the complaint[7]—its issuance became a mere formality. This is revealed, not only in (1) the partisan choice of witnesses to be interviewed (J.A. 46) and (2) the announced determination before completing the investigation that the matter should be prosecuted (J.A. 49-50), but also by (3) the interlineation of dates in the affidavits of two of the Board's key witnesses (Resp. Ex. D-1 through D-3; J.A. 204, 217, 481).

An example of the distortion in fundamental fairness that can arise from combining the roles of investigator and prosecutor is reflected in certain public records called to the attention of the court below.[8] For it later developed that some of the same pharmacists whose testimony was used by the Board to make out its prosecution of anti-union motive in the discharge of pharmacist Nupp, and whose every word was believed in preference to that of employer witnesses without exception, later filed section 8(a)(3) charges of their own. These charges, which theoretically should have involved the same issues of anti-union motive, were summarily dismissed by the Board,

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[7] For example, complaint counsel spoke only to two management witnesses, while contacting a vast majority of the union protagonists whose testimony later formed the entire basis for the Board's case (J.A. 46). Had he talked to management witnesses, especially those in supervisory capacities, the investigator would have discovered the gross inadequacies and improper behavior of the discharged pharmacist, William Nupp, and would not have suggested that the issue of anti-union discrimination could be dropped if the petitioners would only rehire Mr. Nupp (J.A. 41).

Further, it was not until complaint counsel, posing as an impartial investigator, gained the confidence of petitioners' attorneys (J.A. 42) that he revealed his conviction that the case should be tried (J.A. 49-50).

[8] Employer's reply brief in the court below, p. 17.

with prejudice, and without the filing of a complaint. N.L.R.B. Letter Rulings, Region 8, Nos. 8-CA-4248 (Henry Pietras) July 21, 1966; 8-CA-4230 (Carl Eisenhauer) June 30, 1966; 8-CA-4232 (Harry Maza) May 25, 1966; 8-CA-4078 (Joseph Cousino) Dec. 27, 1965.

The instant investigation and its fruits permeated the entire process,[9] from issuance of complaint through the ruling of the Board and its ultimate affirmance in part by the court below. The biased investigation which initiated these proceedings violated the due process requirement of the Fifth Amendment and both the spirit and letter of the Federal Administrative Procedure Act.

C. The dual capacity of complaint counsel further violated statutory administrative procedure.

Much the same observations applicable to the due process clause apply with respect to the Board's obligation to abide by the requirements of the Federal Administrative Procedure Act. The Board has never been exempted from that statute, sec. 2(a), 60 Stat. 237 (1946), reenacted, 5 U.S.C.A. sec. 551(1) (1967). Section 10(e)(B)(5) of that law, 60 Stat. 243 (1946), reenacted, 5 U.S.C.A. sec. 706(2)(E)(1967), provides that a reviewing court may set aside agency action only when it is "unsupported by substantial evidence." This restriction has been interpreted to mean that the federal courts may uphold the finding of an administrative agency, although opposed to the preponderance or the weight of the evidence, so long as there

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[9] For example, despite the abundant doubts whether there was bad faith in the rejection of the bargaining demand, and despite the results obtained in a prior election when the same union similarly claimed a majority of cards (Resp. Ex. G-1 through G-3; J.A. 526-28), the Eighth Regional Office of the Board denied a petition filed by the employer to conduct a representation election (G.C. Ex. 2-B, 2-D; J.A. 492, 494).

is some substantial evidence in the record to support it. *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951). This standard was carried forward specifically into the statute providing for review of Board decisions. Act sec. 10(e), 49 Stat. 453 (1935), as amended, 29 U.S.C. sec. 160(e) (1964).

It seems certain that Congress, in giving so much finality to the findings of administrative agencies, gained the impression and proceeded upon the assumption that the impartial investigation technique would be employed in the public interest. Otherwise, an agency being at liberty to go against the preponderance of the evidence without the intervention of the federal courts, could instruct or permit its investigator to adduce and present only enough "substantial evidence" to support a finding adverse to the respondent. On the other hand, with a full and fair investigation, the respondent will have at least one opportunity to have all of the evidence weighed and to avoid the inconvenience and expense of agency prosecution, and the risks of liability ensuing therefrom, if the preponderance of the evidence does not support the charge before the agency.

The Board itself has recognized this statutory duty to conduct the preliminary investigation with impartiality. Its officials have stated that the administration of its procedures "must be impartial and even-handed in reality as well as just in appearance." Rothman, *Office of the General Counsel of the N.L.R.B.*, 12 Labor L.J. 698, 699 (1961). "Harassment by unnecessary litigation" is a recognized evil to be avoided. *Id.* at 714.

There is, moreover, ground for argument that the Administrative Procedure Act specifically, as well as inferentially, prohibits the investigator from in any way assuming

a prosecutive function. Section 5(c) of that statute, 60 Stat. 239 (1946), reenacted, 5 U.S.C.A. sec. 554(d) (1967), specifically prohibits "any officer, employee, or agent" of the Board from engaging "in the performance of investigative * * * functions" while, at the same time, participating in or advising a decision or a recommended decision.

True, complaint counsel did not participate in the decision of the trial examiner or the Board on the merits of the charge. But he did engage in a "decisional function" [10]—and a very important function, indeed. For upon his decision rested the right of these petitioners to be free from the expensive and time-consuming prosecution herein, ultimately found to be at least partially unjust by the court below.

It does no good to excuse an unlawful procedure on the ground that it "is not unusual" or because "that's the way the Board functions" (J.A. 48).[11] The boundaries of due process and lawful procedure cannot be established by repetition of an unconstitutional and unlawful practice.

D. The holding of the court below with respect to section 8(a)(1) is based exclusively on an erroneous fact finding.

The court below committed two errors in confirming the Board's finding that the employer violated section 8(a)(1) of the Act. The first error, explained above, was in sanctioning the unconstitutional and unlawful adminis-

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[10] Language of Board brief in the court below, p. 52.

[11] These excuses were given by the trial examiner in rejecting the motion of the petitioners, in the alternative, either to dismiss the prosecution or to disqualify complaint counsel (Resp. Ex. A; J.A. 37-42).

trative procedures of the Board which produced the section 8(a)(1) prosecution.

The second error was in the court's fact-finding in support of its section 8(a)(1) ruling. The court below did not find coercive interrogation—in fact, it found no interference with any organizational rights of the pharmacists except that certain promises of benefits were made to them by the employer. 391 F.2d 812, 817-18. The finding that benefits were granted is completely without support in the record before the trial examiner and the Board and therefore cannot be sustained. *N.L.R.B. v. United Steelworkers,* 357 U.S. 357, 364 (1958).

The only factual basis cited in support of the court's ruling that benefits were offered is a statement that Nupp was promised an increase in salary. 391 F.2d at 818. The best that Nupp claimed was that he was offered a position as a store manager, although he did not want the job (J.A. 228). The record stands uncontradicted, however, that this was an offer of no benefit at all—merely an additional burden. For the pharmacist-managers and pharmacist-assistant managers in the petitioners' marketing system received precisely the same base pay, bonuses, vacation benefits, hours of employment, sick pay considerations, and other fringe benefits as their fellow non-managing pharmacists (J.A. 179, 185-88).

There also is not a shred of evidence in the record that any representative of the employer offered any pharmacist any raise or other additional fringe benefit after the employer learned of the organizational activity. Indeed, there is evidence to the contrary (J.A. 160, 439).

E. Summary.

The employer recognizes that the aspects of this case set forth herein might not be sufficiently important to

warrant an independent petition for certiorari, despite the importance of a proper construction of the constitutional, statutory, and judicial review issues listed herein. But if the Court determines to grant a petition for certiorari filed by the Board or the union, or both, the employer believes that the Court should review the entire case and correct the plain errors of the court below with respect to the sections 8(a)(1) and 8(a)(3) findings. Accordingly, the employer is filing this petition.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that, in the event the Court should grant a petition for a writ of certiorari either to the Board, the union, or both, this petition for a writ of certiorari should likewise be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided March 29, 1968.)

No. 17466.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT.

LANE DRUG CO., a Division of A. C. Israel Commodity Corp., Lane's of Sylvania, Inc., Lane's of Bowling Green, Inc. and Lane's of Oregon, Inc.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

RETAIL STORE EMPLOYEES UNION LOCAL 954, etc.,

Intervenor.

Before WEICK, Chief Judge, PHILLIPS, Circuit Judge, and MCALLISTER, Senior Circuit Judge.

WEICK, Chief Judge. The controversy in this case grows out of efforts to organize the pharmacists employed by Lane Drug Co., an Ohio corporation, and its three corporate affiliates, in seventeen drug stores [1] located in Toledo, Ohio and environs.

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[1] The eighteenth store, employing two pharmacists, was opened in Fostoria, Ohio, about two weeks after the union filed the unfair labor practice charge.

The union [2] sought to obtain recognition as exclusive bargaining representative of the pharmacists via the signed authorization card route rather than by means of a Board-conducted election.

The union representative attended a meeting of about twenty of the pharmacists which was called late in the evening of April 28, 1965, when sixteen pharmacists signed authorization cards.

The next day, on April 29, 1965, at 5:42 o'clock P.M., the union sent to Lane Drug Co. a telegram stating that it represented a majority of its pharmacists in greater Toledo and Bowling Green, Ohio stores, and requesting a meeting to negotiate a contract covering wages, hours and working conditions for all pharmacists in the above stores, except those who function in a supervisory capacity. The telegram was received by Lane Drug Co. on Friday, April 30th.

On the following Monday, May 3rd, the union, without waiting for a reply, filed with the Board an unfair labor practice charge against Lane, alleging a violation of Section 8(a)(5) of the National Labor Relations Act as amended, 29 U.S.C. § 151, et seq, for refusal to bargain, and also alleging a violation of Sections 8(a)(1) and 8(a)(3) of the Act. An amended charge was filed on June 11th.

On May 4th the union sent another telegram to Lane Drug Co. repeating its demand for recognition and offering to prove its majority through the facilities of an impartial third party, the Toledo Labor Management Citizens Committee.

Subsequent to the filing of a complaint, a hearing was conducted before the trial examiner, who rendered his

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[2] Retail Store Employees Union Local 954, Retail Clerks International Association, AFL-CIO.

decision holding that Lane and affiliated companies violated Section 8(a)(1) of the Act by interrogating their employees concerning their union activities or sympathies, by soliciting employees to survey and report to them the activities of other employees in behalf of the union, by promising benefits to pharmacist Nupp in order to have him to discontinue his organizational activities, by attempting to deal with strikers on an individual basis, and by stating that the companies would not recognize any union. The examiner expressly found, however, that Lane did not threaten the pharmacists with discharge or reduced hours in reprisal for union affiliation or activities. The examiner further found that Lane violated Section 8(a)(3) of the Act by discharging pharmacist William P. Nupp, and violated Section 8(a)(5) of the Act by refusing to bargain with the union on April 29th and thereafter. He recommended that pharmacist Nupp be reinstated with back pay, that Lane be ordered to bargain with the union, and that appropriate notices be posted.

The Board, in reviewing the examiner's decision, upheld his findings as to Section 8(a)(1), 8(a)(3) and 8(a)(5) violations, but found that he was in error in holding that Lane violated the Act by refusing to bargain in response to the April 29th telegram, because on that date the union with only sixteen cards, did not in fact represent a majority of the appropriate unit of thirty-two pharmacists.[3] The Board held, however, that on May 4th, when the union repeated its demand for recognition, it

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[3] The Examiner had excluded from the bargaining unit pharmacists Waldman and Searle. The Board held that Waldman, a part time employee, should not have been excluded, and that Searle was properly excluded because of lack of community of interest with the other pharmacists. This was not the reason given by the Examiner. By excluding Waldman from the unit, the union lacked a majority.

had acquired an additional card and therefore had a majority of one; that Lane did not have a good faith doubt about this majority; and that Lane was therefore in violation of Section 8(a)(5) by refusing to bargain with the union. The Board pointed out a number of errors in the examiner's decision, which it termed "discrepancies," but held that they did not affect his ultimate conclusion or its concurrence therewith.

Upon consideration of the record as a whole, we agree that there was substantial evidence to support the Board's findings of Section 8(a)(1) violations in the respects hereinafter pointed out, and the findings with respect to the 8(a)(3) violation, but we do not agree that there was substantial evidence to support its finding as to a Section 8(a)(5) violation.

Lane owned and operated a chain of fourteen drug stores in the Toledo area. Its affiliated companies, as indicated by their respective names, operated three additional stores in Sylvania, Bowling Green, and Oregon, Ohio. The eighteenth store was opened on May 18, 1965, at Fostoria, Ohio.

A stipulation was filed at the hearing before the examiner, to the effect that the four separate corporations constituted a single employer within the meaning of Sections 2(6) and (7) of the Act. This was because the corporations had substantially the same officers and directors, with the President and Vice Presidents exercising substantial control over their operations and having centralized purchasing, warehousing and payroll systems. The General Manager of the stores, Pethke, was stationed at Toledo and under him were two nonpharmacist supervisors, Wagenman and Willis, each supervising about one-half of the stores. In each store there was one manager and one assistant manager, some of whom were pharma-

cists, and some were not. A store manager and assistant manager work alternate shifts, so that one of them is in the store at all times.

Ohio law requires pharmacists to be graduates of a recognized school or college of pharmacy, to serve for one year as an intern in a drug store under the supervision of a registered pharmacist, and to pass an examination conducted by the State Board of Pharmacy, in order to obtain a Certificate of Registration. Ohio Rev. Code § 4729.08. The law further provides that a retail drug store shall be "in full and actual charge" of the registered pharmacist. Ohio Rev. Code § 4729.27.

The leader in the organizational movement was pharmacist Nupp, who had been in the employ of Lane since 1961. In the latter part of 1964 Nupp contacted a substantial number of the pharmacists, including pharmacist-managers and assistant managers, to ascertain whether they were interested in forming an organization to deal with the company concerning working conditions. He learned that there was considerable sentiment toward formation of some type of an organization, but there was a difference of opinion as to whether there should be a union "because of professional reasons."

Nupp testified that Vice President Kaye visited him twice at the store where he worked, shortly before Christmas of 1964. Kaye told Nupp that he knew of his organizational efforts and asked him the reason for such activity. Nupp detailed some of the complaints of the pharmacists and Kaye said he would discuss them with the men but that he thought they should bargain only on an individual basis. Kaye told Nupp that he liked him and would like him to become manager of a newly opened store, and that he would prefer that Nupp not continue his efforts to organize a union. Nupp said he was not

interested in becoming a store manager. Kaye told Nupp, in a "cynical" tone according to Nupp, that he [Nupp] did not have to worry about losing his job for what he had done. At the second meeting Kaye repeated substantially the same statements but Nupp did not testify as to any cynicism in this conversation. Kaye added that a pay increase for Nupp could be arranged and that he also might obtain an interest-free loan.[4]

Kaye also interviewed pharmacist Eisenhauer and suggested that Kaye be called on the telephone any time a pharmacist had a grievance.

In January, 1965, Kaye suggested that Nupp write to the Cleveland office and request a $15,000-loan on his own terms. Kaye further told Nupp that he would look into the complaints and would discuss them with the pharmacists. He asked Nupp not to discuss any store problems with fellow employees, but to call him [Kaye] or Manager Pethke. Nupp told Kaye that what Kaye said made him quite happy and that he was satisfied with Kaye's assurances.

After this meeting, Nupp discontinued his organizational activities, and in February, 1965, he made application by letter to the company for a $14,000-loan. In the letter he stated that he and his wife thought it would be more advantageous for them to remain in Toledo rather than go to California. Several weeks later Kaye told Nupp that the company would loan him only $4,500, which Nupp stated was satisfactory; but he nevertheless resumed his organizational activities. He and three other pharmacists held a meeting, at which he was authorized to contact local unions. Around April 10th General Manager Pethke

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[4] Nupp's home was mortgaged in the amount of fifteen thousand dollars. He was interested in obtaining a loan from the company in order to pay off his mortgage.

told Nupp his application for a loan had been denied; that he [Nupp] was a trouble maker; and that Pethke would prefer that he leave the company. Nupp did not leave.

In the middle of April, Nupp contacted the union and arranged a meeting for the 28th of April. Eighteen to twenty pharmacists, including Assistant Manager Rettig, were invited to attend the meeting. There was some interrogation of two pharmacists by supervisors concerning the meeting. In one interrogation Supervisor Portteus told pharmacist Maza, "If I were you, I wouldn't get mixed up with this union activity that Bill Nupp is trying to start."

On April 28th, shortly before closing time around 9:30 p.m., Supervisor Willis discharged Nupp, giving as a reason that another pharmacist wanted to transfer to his store, said pharmacist having been a manager of Store No. 3. The discharge of Nupp was the subject of considerable discussion at the meeting of pharmacists held on April 28th, and undoubtedly had some impact on influencing the sixteen pharmacists to sign the union cards that evening.

After the two telegraphed demands of April 29th and May 4th, the filing of an unfair labor practice charge by the union on May 3rd, and other intervening activities by Lane and the union, Lane wrote to the union on May 12th expressing doubt as to its majority status; and on the same day Lane filed a representation petition with the Board for all pharmacists, except supervisors, employed by it at its drug stores in Toledo and vicinity.[5]

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[5] Lane's petition was later withdrawn. On August 18, 1965 another representation petition was filed in behalf of all four corporate employers. The Board denied this second petition on the ground that an unfair labor practice charge against the companies was pending.

Another meeting of about twenty pharmacists was held on May 13th and they voted to go on strike, which strike lasted for about two weeks. Sixteen pharmacists picketed about ten drug stores. During the strike additional contacts were made with pharmacists by supervisors, requesting that they deal with management individually. The president of the companies wrote to the pharmacists suggesting that if they had problems they should talk with him directly, instead of through a go-between. He also stated that he would not talk to a union organizer or outsiders.

Section 8(a)(1) Violations.

The employer has a right to talk with his employees and to express his views as to whether or not they should join a union. *Jervis Corp. v. NLRB*, ____ F.2d ____ (6th Cir. 1967). This right of free speech prevails, however, only so long as the interrogation is noncoercive. *NLRB v. Welsh Industries, Inc.*, 385 F.2d 538 (6th Cir. 1967).

The interrogation should be viewed in the context that the pharmacists were all college graduates, duly licensed to practice their profession. They had no difficulty in getting employment at drug stores. Some of them worked for other employers. In the light of this fact it is interesting to note that the examiner found that no pharmacist had been threatened with discharge or shortening of his hours of work. The burden was upon the General Counsel to prove that the interrogation was coercive. In our opinion he did not sustain that burden.

The pharmacists were, however, promised benefits if they would deal with the employer directly. The offer to pharmacist Nupp of a loan and an increase in salary is evidence of this. They were asked to prevail on other employees to deal directly with the employer. The em-

ployer told pharmacists that he would not deal with the union. The employer's conduct, in our opinion, constituted an interference with the employee's right to organize, guaranteed under Section 7.

We conclude that substantial evidence supported the Board's finding as to Section 8(a)(1) violations in the respects above noted. *NLRB v. Universal Camera Corp.*, 340 U.S. 474 (1951).

Section 8(a)(5) Violation.

The findings of violation of Section 8(a)(5) present the important question of whether the employer had a good faith doubt about the union's representation of a majority of employees when the demands of representation were made. If the employer had such a doubt it cannot be found guilty of unlawfully refusing to recognize the union, even though the union actually represented a majority of the employees. *NLRB v. H & H Plastics Mfg. Co.*, ____ F.2d ____ (6th Cir. 1968); *Peoples Service Drug Stores Inc. v. NLRB*, 375 F.2d 551 (6th Cir. 1967); *Pizza Prods. Corp. v. NLRB*, 369 F.2d 431 (6th Cir. 1966).

Contrary to the findings of the trial examiner and the Board that there was no reason for Lane to doubt the majority status of the union, we think that several bases for a good faith doubt, which have been judicially recognized, did in fact exist at the time Lane was found to have violated section 8(a)(5). It is clear that the burden of proof was upon the General Counsel to establish the lack of good faith of Lane in refusing to bargain. *NLRB v. River Togs, Inc.*, 382 F.2d 198 (2nd Cir. 1967); *NLRB v. Great Atl. & Pac. Tea Co.*, 346 F.2d 936, 939-40 (5th Cir. 1965); *Aaron Bros. of Cal.*, 158 NLRB 1077 (1966).

The first basis for a good faith doubt is the fact that Lane officials, as a result of investigations after the first

demand, had received indications from several of its pharmacists that "not many" of them were interested in the union. Supervisor Willis, who had been instructed to make the investigation shortly after the first demand, talked with pharmacists Yarnell, Newhard and Langdon, who had also talked with other pharmacists, and they advised Willis in substance that they did not think many of the pharmacists were interested in the union. Willis testified that these responses were typical of others which he received from pharmacists and store managers. Willis reported to the General Manager that only a few of the pharmacists were interested in the union; that a majority of them were not interested; and that some who signed indicated that they felt they should, or had to. This testimony was not controverted.[6]

A further reason for Lane to doubt the majority claimed by the union, not discussed by either the examiner or the Board, is the fact that on January 15, 1954, the same union had made a written demand to Lane for recognition as bargaining agent for some of its clerical employees, and represented that it had been designated and authorized by a majority of the employees. Lane petitioned the Board for an election, which the Board granted. The result of the election was that out of a total number of 191 eligible voters, the union received only 28 votes, with 154 employees voting against the union. In determining the good faith of the employer, its previous experience with union cards or elections is a factor which is

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[6] The examiner summarized this testimony in his decision but he thought Willis was "unnecessarily evasive and vague about these conversations, incredibly testifying that he 'more or less listened to what they had to say about it' and that he 'didn't really do any questioning as to what took place.' " We see nothing vague, evasive, or incredible about the testimony of Willis concerning what the pharmacists had told him and his report to his superior.

considered. *Peoples Service Drug Stores Inc. v. NLRB*, 375 F.2d 551 (6th Cir. 1967); *NLRB v. Johnnie's Poultry Co.*, 344 F.2d 617 (8th Cir. 1965); *NLRB v. Hannaford Bros. Co.*, 261 F.2d 638 (1st Cir. 1959).

The union was interested in becoming collective bargaining representative of the pharmacists, if this could be accomplished without an election, and apparently in a hurry. The first telegram demanding recognition was sent after business hours on April 29th and was received by the company on Friday, April 30th. Although the company did begin an immediate investigation, the union did not wait for a reply, and on the following Monday it filed an unfair labor practice charge, alleging a Section 8(a)(5) violation for failure to bargain, along with violations of Sections 8(a)(1) and 8(a)(3). In light of the union's erroneous claim of a majority in 1954, and the hurried procedure of the union in attempting to gain recognition on this occasion, it was not unreasonable for Lane to look upon the union's claim of representing a majority of its pharmacists with skepticism, and these two considerations would provide further reason for a good faith doubt.

When the union made its first telegraphic demand, it did not have a majority. It was only by erroneously excluding from the unit a part time employee who the Board found should have been included, that the examiner was able to find a majority existed on April 29th. A few days later the union secured another card and made its second telegraphic demand, which the examiner and the Board both found gave the union a majority of one—a slim margin, indeed. The existence of a majority by a slim margin is also a factor which must be considered in determining whether a good faith doubt existed. *NLRB v. Great Atl. & Pac. Tea Co., supra.* See also *Pizza Prods. Corp. v. NLRB*, 369 F.2d 431, 438 (6th Cir. 1966).

Neither of the bargaining demands (the telegrams of April 29th and May 4th) clearly designated which stores or pharmacists the union claimed to represent. This lack of clarity was an additional reason for Lane to doubt in good faith that the union had the majority that it claimed. The two demands were addressed only to Lane Drug Company. While they mentioned Bowling Green, the demands were not addressed to Lane's of Bowling Green, Inc., which owned and operated the Bowling Green store. Nor were the demands addressed to Lane's of Sylvania, Inc., or Lane's of Oregon, Inc., which owned and operated stores in those cities. The employer was supposed, apparently, to divine whether the union intended to include them.

The Board ruled that all managers and assistant managers-pharmacists were supervisors and hence not includable in the bargaining unit. This was clear after the Board made the ruling, but it was not too clear at the time the demands for recognition were made. Ohio law seems to require that pharmacists be "in full and actual charge of the store." Ohio Rev. Code § 4729.27. This would appear to require that the pharmacists on duty at the time be in charge of the store.

When a manager-pharmacist was relieved by his assistant, the latter was in charge of the store. None of the manager-pharmacists or assistant managers had power to hire or discharge employees, but they were authorized to make recommendations in that regard. The stores were all supervised by two general supervisors, Wagenman and Willis, who visited them daily. One pharmacist testified that the difference between a manager and a nonmanager was that the former had keys to the store and the latter did not. There was no difference in compensation.

One of the pharmacist-managers was invited to attend the organization meeting of April 28. He must have been considered eligible to attend and participate in the union. There was substantial interchange of employees among the stores. There was the problem of whether part time pharmacists, pharmacist-interns, and pharmacists who were on sick leave, but who were still carried on the employer's books as employees, were eligible to be included in the unit. There was a question of eligibility of pharmacist Searle to be included in the unit. Searle was stationed at the warehouse, and his chief function was to order drugs, but he also served in stores as a pharmacist, in emergencies. There was also a question whether pharmacists who left the employ shortly after the demands, and pharmacists who were employed shortly thereafter in the newly opened store, should be included or excluded from the unit.

In addition to demonstrating a further basis for a good faith doubt, all of these questions suggest that the best procedure to be followed in a case of this kind is a Board-conducted election, where the bargaining unit would be determined by the Board and the eligibility of employees fixed at one time, the date of the election. *NLRB v. General Tube Co.*, 331 F.2d 751 (6th Cir. 1964).

Under the circumstances of this case the employer is placed on the horns of a dilemma. If a majority exists and he refuses to recognize it, he violates Section 8(a)(5). This was the ruling of the Board in the present case. On the other hand, if the employer recognizes a union which does not in fact represent a majority, he violates Section 8(a)(1) and 8(a)(2). The Supreme Court so held in *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961), and held further that the employer's good faith was not a defense. Mr. Justice Clark, who wrote the opinion for the Court, said:

> "More [than a Section 8(a)(2) violation] need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith." *Id.* at 739.

It is contended that failure of the employer to accede to the union's offer for a check of authorization cards by a neutral third party, is proof of the employer's bad faith. This is not necessarily so. The use of such cards has been held by the Board to be a "notoriously unreliable method of determining the majority status of a union." *Sunbeam Corp.*, 99 NLRB 546, 550, 551 (1952). An order to bargain, based thereon, has been described as "strong medicine" to be applied only "with restraint". *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78-79 (2nd Cir. 1965). The offer of a check of authorization cards "does not impose a duty upon the company to submit to the check or suffer the consequences of a refusal-to-bargain charge." *NLRB v. Great Atl. & Pac. Tea Co.*, 346 F.2d 936, 942 (5th Cir. 1965). See also *NLRB v. S. S. Logan Packing Co.*, ___ F.2d ___ (4th Cir. 1967); *Peoples Service Drug Stores, Inc. v. NLRB*, 375 F.2d 551 (6th Cir. 1967); *NLRB v. Johnnie's Poultry Co.*, 344 F.2d 617 (8th Cir. 1965).

The fact that the employer committed unfair labor practices in violation of Sections 8(a)(1) and 8(a)(3) is not of itself sufficient reason to negative a good faith doubt. *Peoples Service Drug Stores Inc. v. NLRB, supra*, at 556. See also *NLRB v. S. S. Logan Packing Co.*, ___ F.2d ___ (4th Cir. 1967). An 8(a)(1) violation without more is just as consistent with a disbelief in the majority status of the union as it is with a belief in the majority status. An order to bargain, based on an 8(a)(1) violation, will not be enforced. *NLRB v. River Togs, Inc.*, 382 F.2d 198, 207 (2nd Cir. 1967); *NLRB v. Flomatic Corp.*, 347 F.2d 74 (2nd Cir. 1965).

Finally, the employer urges bias on the part of the trial examiner in his rulings at the hearing, in crediting the testimony of witnesses of the General Counsel most of the time, and in crediting the testimony of the witnesses of the employer hardly any of the time, and also urges bias in the use of intemperate language in his decision. We have considered these claims, but in our judgment they are not sufficient to establish bias.

The order of the Board is enforced with respect to the Section 8(a)(1) violations, approved herein, and enforced with respect to the Section 8(a)(3) violation. Enforcement is denied with respect to the claimed Section 8(a)(5) violations.

APPENDIX B.

ORDER OF THE COURT OF APPEALS.

(Dated: March 29, 1968.)

On petition to review, set aside and on cross-petition for enforcement of an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the order of the Board is enforced with respect to the section 8(a)(1) violations, approved in the opinion, and enforced with respect to the section 8(a)(3) violation. Enforcement is denied with respect to the claimed section 8(a)(5) violations.

No costs awarded. Rule 23(4).

Entered by order of the court.

CARL W. RUESS, *Clerk.*

APPENDIX C.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

On April 26, 1966, Trial Examiner Stanley N. Ohlbaum issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondents had not engaged in certain other unfair labor practices and recommended that the complaint be dismissed with respect thereto. Thereafter, the Respondents filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed a brief in answer to the Respondents' exceptions. The Charging Party filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision, the exceptions, and the briefs, and hereby adopts the Trial Examiner's findings,[1] conclusions, and recommendations, as modified herein.[2]

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[1] We note the following discrepancies in the Trial Examiner's Decision, which do not affect his ultimate conclusions or our concurrence therewith, as modified herein: (1) Although the Respondents did not admit in their answer that Assistant Store

(Continued on following page)

1. The Trial Examiner found, and we agree, that Respondents violated Section 8(a)(1) of the Act by coercively interrogating employees, promising them economic benefits, enlisting employees to engage in surveillance and to dissuade other employees from supporting the Union, soliciting employees to deal directly with Respondents instead of through a union bargaining representative, and threatening them with economic detriment for continuing their union affiliation or collective-bargaining endeavors.

2. The Trial Examiner also found, and we agree, that Respondents discriminatorily discharged pharmacist William P. Nupp on April 28, 1965, in violation of Section 8(a)(3) and (1) of the Act.

3. The Trial Examiner found that the Union represented a majority of 16 pharmacists in an appropriate unit

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(Continued from preceding page)

Manager Rettig (Reddig) is a supervisor, as the Trial Examiner stated, the record establishes that Rettig is a supervisor, as the Trial Examiner found. (2) Assistant Store Manager Dittman's conversation, about a week before April 28, was with pharmacist Nemetz, and not with pharmacist Molnar, as the Trial Examiner stated. (3) The Trial Examiner, in one instance referred to an unlawful refusal to bargain as a violation of Section 8(a)(3), instead of Section 8(a)(5) of the Act. (4) We find that the conversation between Vice President Kaye and pharmacist Maza, in which Kaye admitted knowing there were 19 pharmacists for, and only 10 against, the Union, occurred on May 9, and not on May 2, as found by the Trial Examiner, for the following reasons: (a) Maza, whom the Trial Examiner credited, testified that it took place on either May 2 or May 9, but in any event on the Sunday following the second scheduled Union meeting which the record indicates was held on May 7; (b) Kaye failed to testify; and (c) we find no merit in Respondents' contention that Kaye was in Oxford, Ohio, on May 9, and therefore could not have been in Toledo, as this contention is based solely on the testimony of Vice President Rivelis, who was not credited in other respects by the Trial Examiner, and there is no showing that Kaye could not, at different times on May 9, have been in both cities, which are approximately 200 miles apart.

[2] The Respondents' request for oral argument is hereby denied as, in our opinion, the record, exceptions, and briefs adequately present the issues and the positions of the parties.

of 31 pharmacists at the time of its original request for recognition and bargaining on April 29, 1965, and that Respondents violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union on and after that date. In finding that the appropriate unit consisted of 31 pharmacists, the Trial Examiner excluded pharmacists Searle and Waldman.

Although we agreed with the Trial Examiner's conclusion that pharmacist Searle is properly excluded from the unit, we do not believe the record supports the Trial Examiner's finding that Searle is a supervisor or managerial employee. The only evidence in the record which suggests that Searle is a supervisor is a notice to Respondents' pharmacists posted in its pharmacies more than 2 years ago setting forth general prescription-filling practices and techniques and signed by Searle over the designation "Chief Pharmacist." This designation alone is not sufficient to establish that Searle is a supervisor. Unlike unit pharmacists who fill drug prescriptions in Respondents' retail stores, are supervised by store managers and assistant managers, and who work 88 hours, including Sundays, during 2-week pay periods, Searle works a regular 48 hour, 6-day week, exclusive of Sundays, under the supervision of General Manager Pethke, reviewing and determining appropriate drug merchandise supply levels at Respondents' central drug warehouse which is geographically separate from Respondents' retail drugstores. Once a year Searle visits each retail drug store in Respondents' chain to inventory drug levels. In ordering drugs for Respondents' warehouse, Searle fills out requisitions which are then reviewed by Pethke and forwarded to Respondents' headquarters in Cleveland where they are again reviewed, and sometimes modified, before being sent to drug manufacturers. Searle only occasionally orders

drugs directly from drug manufacturers. In these circumstances, we do not agree with the Trial Examiner that Searle is a managerial employee. However, as Searle's geographical location, hours of work, supervision, and duties are different from those of unit pharmacists, we find that he lacks a sufficient community of interest with those in the unit, and we shall, therefore, exclude him.

The Trial Examiner excluded pharmacist Waldman as a seasonal casual employee. We disagree. The record indicates that from 1957 to 1965 Waldman has regularly worked a substantial number of hours for Respondent in a part-time capacity during winter months from September to April. While employed as a pharmacist, Waldman receives the same pay as other pharmacists and is generally subject to the same working conditions. Although Waldman, pursuant to his usual employment pattern, left Respondents' employ on April 4, 1965, we find that he has a reasonable expectancy of future employment with Respondents and, contrary to the Trial Examiner, that he has a sufficient community of bargaining interests with other unit pharmacists to warrant his inclusion in the unit.

Accordingly, we find that on and after April 29 there were 32 pharmacists, including Waldman, in the unit. As the Union had valid authorization cards from only 16 pharmacists when it initially demanded recognition and bargaining on that date, it did not represent a majority, and the Respondents' refusal to bargain at that time was therefore not unlawful. However, as the Union obtained an additional card on May 3, and renewed its request for recognition and bargaining on May 4, we find that the Respondents' failure to recognize and bargain with the Union on and after May 4 was, as alternatively found by the Trial Examiner, and for the reasons given by him, in violation of Section 8(a)(5) of the Act.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondents, Lane Drug Co., Division of A. C. Israel Commodity Corporation; Lane's of Sylvania, Inc.; Lane's of Bowling Green, Inc.; and Lane's of Oregon, Inc.; their respective officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., Sep. 15, 1966.

FRANK W. MCCULLOCH, *Chairman,*
GERALD A. BROWN, *Member,*
SAM ZAGORIA, *Member,*
(SEAL) *National Labor Relations Board.*

APPENDIX D.

STATUTES INVOLVED.

1. Act sec. 9(c) (1), 61 Stat. 143 (1947), 29 U.S.C. sec. 159(c) (1) (1964):

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—* * *

> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted

by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

2. In pertinent part, Act sec. 8(a), 49 Stat. 452 (1935), as amended, 29 U.S.C. sec. 158(a) (1964):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in sction 157 of this title; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

3. Act sec. 8(c), 61 Stat. 140 (1947), 29 U.S.C. sec. 158(c) (1964):

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

4. In pertinent part, Administrative Procedure Act sec. 5(c), 60 Stat. 239 (1946):

(c) The same officers who preside at the reception of evidence * * * shall make the recommended decision. * * * Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer

* * * shall * * * be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings.

As re-enacted on September 6, 1966, 5 U. S. C. A. sec. 554 (d) (1967), said statute reads as follows:

(d) The employee who presides at the reception of evidence * * * may not— * * *

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.